

**IN THE IOWA DISTRICT COURT FOR STORY COUNTY**

**AMES MUNICIPAL ELECTRIC  
SYSTEM,**

**Petitioner,**

**vs.**

**IOWA UTILITIES BOARD,**

**Respondent,**

**and**

**UNITED STATES DEPARTMENT OF  
AGRICULTURE, IOWA  
ASSOCIATION OF MUNICIPAL  
UTILITIES, and INTERSTATE  
POWER AND LIGHT COMPANY,**

**Interveners.**

**CASE NO. CVCV051775**

**RESPONDENT IOWA UTILITIES  
BOARD'S PRE-ANSWER MOTION  
TO DISMISS AND MOTION TO  
ENLARGE TIME TO TRANSMIT  
CERTIFIED RECORD**

**COMES NOW** Respondent Iowa Utilities Board, by and through its undersigned counsel, pursuant to Iowa Rules of Civil Procedure 1.421 and 1.1602, and Iowa Code § 17A.19(6), and for its Pre-Answer Motion to Dismiss and Motion to Enlarge Time to Transmit Certified Record, respectfully states as follows:

**I. PRELIMINARY STATEMENT.**

1. On February 21, 2020, Petitioner Ames Municipal Electric System (“Ames”) filed a petition for judicial review, initiating the above-captioned case, from an interlocutory and non-final order issued by Respondent Iowa Utilities Board (“Board”).

2. Because the Board order from which judicial review was taken is not final agency action, the Board respectfully requests this matter be dismissed and the case be remanded back to the agency for further agency proceedings and entry of a final order. Counsel for Interstate Power

and Light Company (IPL) and counsel for the Office of the Consumer Advocate (OCA), a division of the Iowa Department of Justice, authorized the undersigned to state that neither IPL nor OCA oppose the Board's Motion to Dismiss. Counsel for the United States Department of Agriculture (USDA) informed the undersigned that USDA supports the Board's motion to dismiss.

3. The Board further requests the period for transmitting the certified record be enlarged during the pendency of this court's review of the motion to dismiss. Counsel for IPL authorized the undersigned to state that IPL does not oppose the Board's Motion to Enlarge, and counsel for OCA and counsel for USDA authorized the undersigned to state that OCA and USDA support the Motion to Enlarge. Counsel for Ames informed the undersigned that Ames is agreeable to an extension of the deadline to file the certified record.

## **II. STATEMENT OF THE FACTS.**

4. On September 11, 2018, the USDA filed a complaint with the Board regarding its electric service providers IPL (*i.e.*, IPL and Ames).

5. On January 23, 2020, the Board issued an order that modified the electric service providers' exclusive service territory by removing a portion of Ames' service territory that included the USDA campus and placing that area in IPL's service territory.<sup>1</sup> The order further directed the parties to file with the Board a proposed compensation plan to compensate Ames for the loss of a portion of its service territory.

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1. In ruling on a motion to dismiss, the district court may consider those facts of which the court takes judicial notice. *Geisler v. City Council of City of Cedar Falls*, 769 N.W.2d 162, 165 (Iowa 2009). Judicial notice may be taken of information contained on an executive branch agency's website. *See League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 212-13 (Iowa 2020) (taking judicial notice of data posted on the Iowa Secretary of State's website). Here, the underlying Board orders and decisions are available in its Electronic Filing System in Docket No. FCU-2018-0007. A copy of the Board's January 23, 2020 order is retrievable at: [https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET\\_FILE&allowInterrupt=1&dID=288295&noSaveAs=1](https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&dID=288295&noSaveAs=1).

6. On February 21, 2020, Ames filed its petition for judicial review from the Board's January 23, 2020 order.

7. On February 24, 2020, the Board issued a clarifying order holding that final agency action has not occurred, explaining that the service territory modification is not complete until a compensation plan is approved.<sup>2</sup>

### III. MOTION TO DISMISS.

8. "Judicial review of administrative agency action is a special proceeding [that] is in all respects dependent upon the statutes which authorize its pursuit." *Anderson v. W. Hodgeman & Sons, Inc.*, 524 N.W.2d 418, 421 n.1 (Iowa 1994). The judicial review provisions of Iowa Code chapter 17A are "the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code § 17A.19 (2019). For judicial review of agency action, the procedures contained in chapter 17A "must be adhered to in order for the district court to obtain jurisdiction." *Tindal v. Norman*, 427 N.W.2d 871, 872 (Iowa 1988).

9. Generally, "chapter 17A only allows for judicial review of a final agency action." *Cooper v. Kirkwood Community College*, 782 N.W.2d 160, 166 (Iowa Ct. App. 2010). *See also Christensen v. Iowa Civil Rights Comm'n*, 292 N.W.2d 429, 431 (Iowa 1980) (stating that "[w]e believe the legislature intended . . . that judicial review ordinarily await final agency action"); Iowa Code § 17A.19 (stating that a person "adversely affected by any **final agency action** is entitled judicial review thereof under" Chapter 17A) (emphasis added).

10. Here, the order from which Ames sought judicial review is not final agency action. Instead, as stated in the Board's February 24, 2020 order, "[t]he Board's January 23, 2020 order

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2. On February 26, 2020, USDA intervened in this case and on February 28, 2020, removed the action to the United States District Court for the Southern District of Iowa. On March 27, 2020, Ames filed a motion in the federal case, requesting the case be remanded to state court. The Board and the Iowa Association of Municipal Utilities joined in the motion. On December 20, 2020, the federal district court granted Ames's motion and ordered the remand of the action back to this Court.

did not complete the modification of Ames' and IPL's service territories" because the modification would not be complete "until the compensation amount is determined."<sup>3</sup>

10. A "preliminary, procedural, or intermediate agency action" is subject to immediate judicial review if two conditions are satisfied: (1) "all adequate administrative remedies have been exhausted" and (2) "review of the final agency action would not provide an adequate remedy." Iowa Code § 17A.19(1). These two conditions are not easily satisfied. *Salsbury Labs v. Iowa Dep't of Environmental Quality*, 276 N.W.2d 830, 837 (Iowa 1979). The party seeking judicial review of intermediate agency action bears the burden of establishing the two conditions. *Richards v. Iowa State Commerce Comm'n*, 270 N.W.2d 616, 619-20 (Iowa 1978). Iowa adjudicatory law suggests that if the two conditions are not established, the judicial review is premature. *Salsbury Labs*, 276 N.W.2d at 837-38. More importantly, a petition for judicial review that is not filed in accordance with the requirements of § 17A.19 deprives the district court of jurisdiction over the matter. *Cooper*, 782 N.W.2d at 165. *See also Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 188 (Iowa 2013) (concluding the *Cooper* Court correctly applied Iowa law).

11. Ames cannot establish either of the two conditions for interlocutory judicial review. As noted in its February 24, 2020 order, the Board intends on taking additional agency action in the event the parties are unable to determine compensation. That fact alone suggests additional administrative remedies are available. Further, interlocutory judicial review does not provide any remedy that would not be available should the parties wait until final agency action.

12. Because the order from which Ames sought judicial review does not constitute final agency action, and because Ames cannot demonstrate either of the conditions for intermediate

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3. The Board's February 24, 2020 order is retrievable at:  
[https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET\\_FILE&allowInterrupt=1&dID=293074&noSaveAs=1](https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&allowInterrupt=1&dID=293074&noSaveAs=1).

judicial review, dismissal is warranted so this matter may be remanded back to the agency for purposes of rendering final agency action.

**IV. MOTION TO ENLARGE TIME TO TRANSMIT CERTIFIED RECORD.**

13. Iowa Code § 17A.19(6)<sup>4</sup> permits the district court to enlarge the time by which the agency must transmit to the reviewing court a certified copy of the entire contested case record.

14. The Board requests the period in which it must file the certified record be extended until this Court has an opportunity to review and rule on the motion to dismiss. In the event the Court denies the motion to dismiss, the Board requests the deadline for the transmittal of the certified record be set as 30 days from the date of the denial order.

**WHEREFORE**, the Iowa Utilities Board respectfully requests this Court grant the above-captioned pre-answer motion to dismiss. In the event the Court denies the motion to dismiss, the Iowa Utilities Board requests the Court set the deadline for the transmission of the certified record 30 days from the date of the order.

Respectfully submitted,

/s/ Jon Tack

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**ATTORNEYS FOR RESPONDENT IOWA  
UTILITIES BOARD**

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4. Section 17A.19(6) provides that a certified record should normally be filed within 30 days after the filing of the petition of judicial review. In this matter, USDA removed the case to federal court prior to the expiration of the 30 days and before the Board filed the certified record.

**CERTIFICATE OF  
SERVICE**

The undersigned certifies that the foregoing instrument was filed electronically with the Clerk of Court for Story County and served upon all parties to the above matter to each of the attorneys of record herein at their respective addresses on this 5<sup>th</sup> day of March, 2021.

/s/ Jon Tack

Jon Tack, IUB General Counsel